Comments on Proposed Rule making pursuant to FCC 96-122, Docket CS 96-60, Commercial Leased Access

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I. Summary and Background

A. Leased access under the present rules.

As president of a multi-media company active in production of programming designed to air under the leased access rules, I can give testimony to the sorry state of operator compliance under the existing leased access rules. Cable operators have given the Commission testimony in the past regarding the "lack of interest" in leased access, however this may be due to the many roadblocks operators have thrown in the path of programmers trying to gain access. My company, Lorilei Communications, Inc. has filed no less than 12 Petitions for Relief against various operators to date. While the most serious of the problems we have encountered have resulting in a filing, which is a matter or record, we have encountered a host of non-compliance problems in seeking leased access to various systems. Some of the problems we have encountered on a widespread basis, some of which have precipitated our filing of a Petition for Relief are:

(a) Improperly calculated rates (CSR-4573-L, CSR-4699-L through CSR-4705-L, Lorilei Communications v. Adelphia Cable, West Boca, FL)
(b) Attempts to charge outrageous "administrative fees" (CSR-4487-L, CSR-4626-L, CSR-4627-L)
(c) Minimum blocks of time for part-time access (CSR-4627-L)
(d) Outrageous and unsubstantiated technical or operator fees (Exhibit F)
(e) Insurance requirements for general liability and errors and omissions insurance in face amounts up to $5,000,000. (CSR-4716-L, Lorilei Communications v. Adelphia Cable, West Boca, FL
(f) Denial of access due to leased access channels which are shared usage with public access, local origination, and leased access, thus causing a logjam of activity. (Exhibit G)
(g) Denial of access due to our programming being "commercial in nature". (CSR-4573-L, CSR-4564-L, CSR-4571-L)
(h) Complete ignorance of the leased access rules. (Lorilei Communications v. TCA Cable of Fayetteville, AR)
(i) Referral within the system to personnel unfamiliar with leased access rules.
(j) Refusal to make leased access information available without completing an "application". (Exhibit I)
(k) Total lack of response to leased access inquiries.
(l) Unreasonable withholding of "trade name" of system, making program promotion impossible. Lorilei Communications v. Adelphia Cable, West Boca, FL
(m) Unreasonable time delays in providing requested system information (Exhibit E)
(n) Mis-airing of programs due to our programming being competitive in nature. (Exhibit G)
(o) Requirement that program tapes be at system far in advance of airing (Exhibit H)

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We are probably better equipped to fight for access than most non-affiliated programmers and probably have a better understanding of the FCC rules due to our president's background in Radio broadcasting. We can only imagine the effect some of these tactics have in dissuading other programmers from continuing to seek access. The truth as we see it is that much more leased access activity would be happening if operators simply followed the rules.

It disturbs us that the Commission has not directly responded to the problem of operator non-compliance in its reconsideration of the leased access rules.

B. Insurance

One of the most popular means operators currently employ to avoid leased access compliance is the requirement of an insurance policy with the operator named as co-insured, prior to issuance of a lease agreement. This insurance usually contains general liability and errors and omissions coverage in an amount from $1 million to $5 million dollars. Several contracts from operators we have dealt with include provisions for the insurance to cover "willful and negligent" conduct on the part of the programmer. Such insurance is nearly impossible to obtain and is very costly. Operators complain that this insurance is necessary due to their inability to edit programming from unaffiliated programmers under the rules, however most operators we have attempted to negotiate this point with refuse to consider the content of our past programming, which is family-oriented.

We have found there is no clear-cut policy even within the same company regarding this insurance requirement. For example, TCI has asked for this insurance in response to inquiries for their systems serving Birmingham, AL and Ft. Smith, AR, (Exhibit A and Exhibit B) however we air programming on their systems in Daytona Beach, Florida and Albany, Georgia, without such insurance. If the subject of insurance is such an important matter we would think the requirement of it would be consistent throughout the company. Post-Newsweek systems in Oklahoma require a $5,000,000 errors and omissions policy in order to grant access, and this point is non-negotiable (Exhibit C).

The contracts from these insurance-requiring operators also contain a provision to indemnify the operator for acts of the programmer. We feel that this indemnification provision is sufficient to protect operators from litigation. To our knowledge, no cable operator has paid one dollar of damages to date for any programming carried under leased access; even if they were, leased access is mandated by Congress and is part of doing business as a cable operator. The operator's existing insurance should cover leased access programming liability. We ask that the Commission consider rule making on this matter, making the requirement of insurance to be operator-provided rather than programmer-provided.

C. The Commission's Petition for Relief process.

Our experience has been that filing a Petition for Relief with the Commission does very little to encourage operators to follow the rules.

For example, the first Petition for Relief we filed on March 13, 1995 against Lake County Cable, Leesburg, FL has yet to be reviewed, in fact, we have yet to receive any correspondence from the Commission regarding any action on any of the petitions we have filed. In the meantime, we have been totally barred from access to these operators systems, or are effectively barred due to financial considerations. In the case noted above, the operator demanded administrative fees in an amount greater than $1,000 to be divided equally among those seeking access, with no consideration for the amount of time they used the channel. In our case, the amount was totally out of line for the usage of the system we intended, thus we have been barred from doing business on that system for well over a year.

In our opinion, the Commission has heard the louder voice of the operators who have lobbied the Commission regarding leased access while ignoring unaffiliated programmers who have only the option of relying upon the framework the Commission has given us to resolve disputes. Case in point is the proposed revision of the "implicit fee" formula to the "maximum rate" formula. The Commission, in essence, is proposing to allow cable operators to charge for such ambiguous items as "loss of opportunity" and for lost advertising revenue. We hardly believe that the Commission considered allowing these charges without help from the cable operators lobby. Meantime, the legitimate issue at hand is that operators aren't abiding by the rules because they know nothing substantive will occur if they don't. The manner in which the Commission handles leased access Petitions for Relief is something operators are well aware of, and in our opinion is the reason for non-compliance. The thousands of small programmers for whom leased access was intended do not have the capital to invest in seeking injunctive relief from the Federal Court system. It is only the FCC that stands between us and the operators as an arbitrator. This is a true "David v. Goliath" situation.

In our opinion, operator non-compliance with the leased access rules is the major issue which the Commission should be considering in its revisitation of the leased access rules.

D. The future of leased access

While we welcome an opportunity for additional rule making regarding leased access in order to make the Commission's leased access rules clear, concise and to the point, we are also alarmed and dismayed at some of the points currently being considered as changes to the rules.

We think leased access has a great future to provide alternative entertainment and information to the American public, and as an independent producer we have several projects planned which will move this process along. We would caution the Commission, however, to keep in mind the general non-compliance with the current rules, and to be wary that operators will comply in any better fashion with new rules. For example, we would protest a rate calculation formula that includes many factors as to give operators additional means to increase rates without being compelled to produce the basis of this information to all parties involved in the dispute, including the unaffiliated programmer. In our opinion, this would be alike "taxation without representation", a basis tenet of our Constitutional freedoms.

We encourage the Commission to consider rule changes which accomplish the following goals:

1. Make the calculation of full-time and part-time rates clearer and easier.
2. Require every cable operator subject to the leased access rules to maintain a public inspection file containing leased access rates along every inquiry regarding leased access.
3. Issue along with the revised rules a schedule of fines and forfeitures to be assessed by the Commission for violations of the leased access rules. These monies could be utilized to expand the Cable Bureau. Non-renewal of microwave or STL licenses could be used as a tactic by the Commission to enforce the rules.
4. Expedite the process of resolving leased access disputes within 30 days following the response period (60 days total).
5. Provide for "loss of service" forfeitures to be paid by operators to programmers when the Commission finds the operator in violation of the rules.
6. Consider expanding leased access to direct satellite broadcasters, as this technology has emerged since Section 612 was written by Congress.
7. Amend the leased access rules to include part-time leased access requirements for systems with less than 36 activated channels, especially those with local origination channels already activated

II. Maximum Rate Formula

We think the current implicit fee formula overcompensates operators and are in agreement with the Commission that operators are in effect "double-billing" programmers. Moreover, we would like to present evidence at this time that cable operators are willing to accept much less than leased access rates from those programmers who pose no threat to the operators advertising revenues on a local level (rather than non-affiliated programmers who may be producing programming on the local level, who operators view as direct competitors). Many of the operators participating with Access TV are the same MSO's who are arguing to the Commission that the implicit fee formula doesn't cover their "opportunity costs."

Exhibit D is a story on "Access Television" (ATV) recently published in the April 29, 1996 edition of Cable World magazine. In the story, Cable World reports that ATV has entered into agreements with operators covering 16 million households to purchase "remnant space" (which is frequently on channels used for leased access). The story states that each three-hour block of time has a "relative value" of 2 cents to 20 cents per block.

The following chart demonstrates the dramatic difference between leased access rates and the "relative value" paid by Access TV. No administrative fees or technical charges which might be charged a leased access programmer are included.

System	Primetime leased access rate, 3 hours	Max amount paid by ATV	Difference
Time Warner-Orlando, FL	$1,350	$98.13	-$1,251.87
TCI-Daytona, FL	$138.21	$20.71	-$117.50
TCI-Hoover, AL	$127.68	$16.74	-$110.94
TCI-Montgomery, AL	$450	$30.57	-$419.43
Continental-Jacksonville, FL	$780	$98.64	-$681.36

Some of the systems affiliated with Access TV are so called "tape systems" which we assume are systems airing video tapes rather than satellite-delivered programming,

We urge the Commission to further investigate this wide gap in what operators accept from Access TV and what operators are demanding from the Commission in return for airing leased access programming.

While we welcome a revision of the manner in which leased access rates are calculated, we find the "cost/market" rate formula proposed by the Commission as a solution problematic on several levels:

(a) In 96-122 , part I paragraph 9, the Commission states "the maximum rate would be based on the operator's reasonable and quantifiable costs including a reasonable profit." Then the Commission goes on to state "the operator would be allowed to charge the leased access programmer to cover the reasonable costs of bumping channels to accommodate leased access programmers. The operator would also be permitted to charge part-time leased access programmers any additional costs associated with negotiating and administering part-time leased access programming contracts."

Allowing cable operators to pass along costs such as bumping channels, or allowing operators to pass along additional charges to part-time users for negotiating and administering part-time access will result in reduced leased access usage, because these costs are unquantifiable. Cable operators will react to this opportunity to create cost much as they have in passing along "operator fees". In our opinion, further complication of the rules will result in an exponential increase in disputes, thus exacerbating the "leased access dilemma" of cable operators barring access for any reason they see fit, as has been standard operating procedure for many operators under the existing rules.

We think that it is reasonable to assume that these costs are part of doing business as a cable operator in the U.S. and it is unfair to allow operators to charge over and above the base fee, as the idea is to base the maximum rate on "the operators reasonable and quantifiable costs including a reasonable profit", which is a concept we agree with. Allowing cable operators to pass on these additional fees will, in many cases, result in a rate in excess of what the program time is actually worth in terms of households reached.

The Commission has stated that it agrees with Time Warner that the value of leased access channels is "the opportunity cost imposed on the operator from the lost chance to program these channels". The reality of business is that some ventures are more profitable than others, and that profit or loss of a particular venture will change over time. We fear that if allowed to do so cable operators will attempt to place an unfair value on this "lost chance to program" leased access channels. Again, we feel this is giving cable operators the keys to open a Pandora's box of "unintended consequences". For example as technology allows more and more channels to become available per cable system we would assume the "lost opportunity" would be diminished. What formula, over what period of time, does the Commission propose to equalize these costs?

(b) The other point of concern is how to determine what is a "reasonable profit". Based on our experience dealing with cable operators under the present rules, we believe cable operators will be less than candid in the calculation of their "reasonable and quantifiable costs". As the Commission does not have the necessary manpower to police cable operators to insure their compliance with the current rules, and as each cable system is a unique situation, we believe this approach will not work in everyday practice and the result will be chaos. We sincerely believe this formula will produce a host of "unintended consequences". Unless the Commission desires to find a means of eliminating leased access entirely, it would do well to consider the ramifications of giving operators additional points to contest.

What we propose as an alternative is to revise the current formula in the following manner:

(1) Rather than base the implicit fee on the channel with the highest fee in the tier, simply calculate the programming costs on an average for the tier and subtract this amount from the average of subscriber revenue. This allows the operator a reasonable profit and insures the leased access programmer a reasonable fee.

(2) This would allow the operator the "reasonable profit" the Commission is concerned with and at the same time prevent rate gouging as is currently the case.

(c) The current market rates on cable operator's local origination channels are generally excessive when the operator is capable of program production. In cases where the operator does not produce programming locally, the actual market rate may be less than the leased access rate allows. For example, on it's interconnected channel, which is used for part-time leased access, Media One in Atlanta charges $150 per half-hour as a leased access rate, however Media One airs ATV programming for much less.

In cases where the operator has a strong advertising hold on the market, or where the operator is competitive with its own in-house program production, we believe predatory pricing exists. For example, the Cox-owned system in Ocala, Florida with approximately 30,000 subscribers was charging us $100 per half-hour per airing (prime or non-prime) to air a real-estate program under "market" rates. When we forced the system to finally calculate the leased access rate, it dropped to $6.45 per half-hour in non-prime and $50 in prime. While we forced Cox to begin charging leased access rates, we have been consistently harassed by Cox in Ocala and Gainesville, Florida by our programming being aired minus audio, with video levels misadjusted, being aired at the wrong times or not being aired at all. It is interesting to note that the Cox Gainesville/Ocala interconnect is the number one advertising revenue per sub system in the nation.

In it's "Further order of proposed rule making" (96-122) section 72, we feel the Commission errs in stating that "Congress has defined the appropriate level of output by establishing the set-aside requirement, and the operator cannot restrict the output below this level". The facts, as demonstrated by the exhibits attached and cited herein, demonstrate that operators can indeed restrict output and are doing so, which is part of the reason for the lack of utilization of leased access resources.

The other reason is that leased access is contrary to the nature of the cable business in as much as cable operators generally pay programmers for the programming operators use to attract subscribers. We feel the Commission needs to strongly consider the fact that unaffiliated programmers pay operators (who make a profit) for airing their programs, and that leased access programming may indeed be attractive to subscribers. Cable operators have been allowed to use the set-aside capacity for other reasons (such as cable networks), then must "bump" this programming in response to leased access demand, creating an unfavorable climate for the leased access program (depending on the prior programming) before it is given a chance to develop an audience. In addition, many cable operators forbid leased access programmers from using the system name and channel in promoting their programs, and may place other restrictions in the leased access agreement in order to prohibit the programmer from building an audience. Unaffiliated programmers face an uphill battle in gaining access and being allowed by the operator to promote the product. For the Commission to consider a marketplace-driven rate system at this juncture is to take a giant step backward, for "marketplace" rates aren't necessarily market-driven and true access cannot be assured.

We encourage the Commission to order direct broadcast satellite companies to offer at least one channel available on a part-time basis to accommodate non-affiliate programmers leased access programming. Direct broadcast satellite was not a factor when Congress determined set-asides for cable, however today direct broadcast satellite has become a significant threat to wired cable operators subscriber bases, and should be made available to unaffiliated programmers under the intent of Section 612 upon which the Commission's leased access rules are based.

Designating channels

We agree that operators should be ordered to designate which channels are to be utilized under their set-aside, and that this information should be contained in the public file and be available upon request. We also suggest that cable operators be forced to open new channels in cases where a logjam of activity on one channel makes part-time use impracticable. For example, many operators currently utilize local origination or public access channels for leased access. We currently have a problem with Cox in Gainesville which airs our programming on the public access channel. Under their franchise agreement with the local government they are required to air city council meetings which frequently pre-empt our programming. We have requested that our programming be moved to another channel, but so far have been stonewalled.

Designating the channels to be utilized and making them available upon demand would streamline the leased access process considerably, thus increasing leased access usage and program diversity.

We suggest the channels in the set-aside be spaced evenly throughout the system. For example, a system with 60 channels, and a set-aide of 5 channels would be required to tag a channel as leased access designated every 12 channels, with flexibility for the operator to designate a channel on either side. Therefore, the first leased access channel could be channel 11, 12, or 13. The second channel would be channel 23, 24, or 25. If for some reason the operator wanted to designate channel 2 as a set-aside channel, the next channel would be channel 13, 14, or 15. But in no case could the first leased access channel be higher than 13. This method would insure maximum flexibility for the operator, while insuring unaffiliated programmers the opportunity to reach the system's audience throughout the channel spectrum.
Under the current rules it has been our experience that operators without local origination or mandated PEG channels usually designate a channel in the highest tier (channel 50+) as the leased access channel.

Lost advertising revenues

We disagree that lost advertising revenues are an easily quantifiable item. For example, the networks commanding the highest ad revenues on most systems are CNN, ESPN and USA, while Lifetime or Discovery is frequently "bonused" (made available gratis) to advertisers. In order to accurately calculate the lost ad revenue from a particular channel, each contract for that channel would need to be audited. Many cable systems attempt to "hide" these "bonus" spots on the local level from their corporate offices further exacerbating the problem.

Advertisers may pay a tremendously different rate one from the other, depending on what advertising "package" they have purchased. Therefore, a channel with lesser value may appear to generate higher revenue than it would if not "packaged" with a channel commanding a higher rate. Again, in order to quantify the actual advertising value of the channel, all advertising revenues for the entire system would need to be audited, if this is even possible.

We also disagree with this idea on the grounds that if the channel was generating advertising revenue up to the point of being utilized for leased access, this revenue was available to the operator only because the demand level of leased access usage had not risen to include this set-aside channel. In other words, we take the position that the advertising revenue is actually additional revenue over and above what the operator could have reasonably expected to earn had it not been for the Commission allowing operators to use leased access channels for other purposes, and is not "lost" revenue at all. We strongly disagree with the concept that a non-affiliated programmer should be forced to compensate an operator for "lost" advertising revenue.

Many operators mandate a total running time for half-hour programs airing on a part-time leased access basis of 28:30 (twenty-eight minutes, thirty-seconds) in order to accommodate the operators advertising or other program matter. When considering the issue of advertising, we recommend that the Commission consider adding a provision in the rules to compensate programmers for the lost time.

Lost Commissions

We disagree that programmers should compensate operators for "lost commissions" caused by bumping direct sales programmers from the system. The channels an operator carries over and above those required by law is purely up to the operator, however in the case of leased access, the set aside has been in force since 1984, therefore we certainly would disagree with any plan which compensates operators for lost commissions if the channel was placed on the system after the date the set-aside rules went into effect.

The other problem with compensating operators for so called "lost commissions" is what period of time to compensate the operator for. Certainly cable operators would argue that this compensation should be ongoing with some form of annual increase. We would disagree with ongoing compensation on the grounds that there is no guarantee that the operator would continue to receive commissions at any certain level in the future.

Lost subscriber revenue/dark channels

We agree with the Commission's tentative conclusion that subscriber loss due to leased access is too speculative to measure accurately. In fact, much leased access programming is of an informational or local nature which may actually attract subscribers. This can especially be true in the case of dark channels. If an operator has not seen fit to fully develop the system to the limits of its technical capacity and is forced to activate a dark channel due to leased access demand, subscribers gain an additional channel. We view this as a benefit for the operator rather than a loss as the leased access channel is revenue-generating rather than creating additional program cost. Therefore we disagree with the proposal to assess opportunity costs on dark channels.

Averaging channel costs for all designated channels

While we disagree that the implicit fee formula needs to be entirely scrapped, in consideration of the cost formula we feel that averaging channel costs is a fair and equitable method of calculating costs.

Calculation of the leased access programmer charge

While we disagree on some of the points of net opportunity costs, lost commissions, lost ad revenue, etc. we agree with the Commission on the manner of calculating the leased access programmer charge

Part-time administrative costs

Many cable systems which we have gained access to and on which our programming airs handle part-time leased access through the advertising department. While this has caused us innumerable problems due to lack of knowledge regarding leased access rates, rules, etc. it does demonstrate that cable operators have the framework within their organizations to easily accommodate part-time leased access requests.

As far as "negotiating" leased access is concerned, we have found no widespread "negotiating" happening with cable operators; rather, as we have explained above, we have had much difficulty in getting cable operators to abide by the rules.

We totally disagree with the concept of allowing cable operators to make additional charges for "administration costs" to part-time leased access programmers. What the cable systems are really asking the Commission for is a way to mitigate the ability under the current rules of part-time programmers to compete with operators on a level playing field. We fear that by allowing these charges the Commission will be placing an unfair and untenable burden on part-time programmers, which are at present the bulk of leased access utilization.

If the Commission decides this issue in favor of the operators, we would request that specific rules be implemented to insure that cable operators do not place excessive and exorbitant fees on part-time users as demonstrated in exhibit J. A specific and detailed formula for calculating actual charges is needed as a safeguard to the concerns we addressed previously. We also ask that operators as part of the administration of part-time access, be required to supply programmers with a notarized affidavit of performance of the airing of programs to include the day, date, time and duration of each program with a detailed monthly invoice and statement. It is important to note that most cable operators make this information and service available to commercial advertisers at no additional cost.

Market rate as the Maximum rate

We are concerned that operators will attempt to avoid leased access by stating that the set-aside has been met and that the programmer must pay market rates. This has already happened to us on several occasions. We ask that, upon request, an operator that asserts that the set-aside has been met must be able to prove that the set-aside capacity has been utilized, and by whom, including names, addresses, phone numbers, and beginning and ending dates of such agreements. Otherwise, the Commission is opening the door for more "unintended consequences".

Transition period

We generally agree with the period the Commission has proposed. In the case of programming which must be bumped due to leased access programming, we would recommend a period no longer than 30 days for notice to all parties from the date of the formal request from the leased access programmer to the operator.

Recalculation of rates

We recommend that operators be allowed to adjust both full-time and part-time rates annually, but not more frequently than annually. We also agree that operators should be allowed to adjust their set-aside (under the recommendations we previously made) on an annual basis. In cases where full-time leased access programming channel positions are moved by such adjustments, we believe the programmer should be compensated for the move by mandatory inclusion in any advertising or marketing the operator may initiate to publicize the new lineup to subscribers or potential subscribers.

Part-time rates

We feel that allowing operators to charge part-time programmers any amount in excess of what is allowed for full-time programmers, regardless of the method utilized for calculating leased access rates in general, is an affront to what Congress intended when it created leased access.
We strongly urge the Commission to continue with the concept that part-time rates are a division of full-time rates, calculated in the same manner.

Most leased access usage is currently part-time. Desktop video is one of the uses supporting computer sales. Many of these new producers have yet to discover leased access, however if the Commission allows rates to remain fair, they will. We believe this is what Congress in its wisdom foresaw, and it will come to pass. We sincerely believe if the Commission allows these rates to be in excess of full-time rates that leased access usage will plummet and the operators will have succeeded in their goal of eliminating leased access altogether.

The basic unit of programming is the half-hour. All of the programs we currently produce for cablecasting under the leased access rules are half-hours. We believe operators should continue to be required to accept programming in as small an increment as one half-hour, with no minimum purchase requirement, and with no surcharge to be applied to smaller users.

We also urge the Commission to address the issue of broadcaster's liability insurance, specifically for part-time users. Operators have attempted to use insurance as a roadblock to access and we feel that requiring programmers to purchase an errors and omissions policy in order to air part-time programming is unfair, and is one of the prime factors hampering development of leased access.

Preferential Access

We are against any rule making which would give preference to any group or individual based on its profit motive, race, religion, creed, or sex.

Obligations to open new channels and bump existing non-leased access services

We have attempted in many cases to obtain part-time leased access on systems offering only a single channel for all part-time leased access programs, franchise required programming, and local origination. In such cases the development of our programming has been severely curtailed due to lack of channel space, while the operator profits from utilizing the leased access channels it is legally required to set aside for other purposes.

For example, the Continental system in Jacksonville offers only one channel for all these programming entities. We would like to purchase a 7 day strip in prime access, however we have been told that this time is unavailable.

A similar situation exists in Orlando on the Time Warner system, where the 6:30 P.M.-8:00 P.M. time period on the only designated leased access channel (16) is permanently blocked from leased access by a local television station's agreement with the system under re-transmission consent. We have asked to place programming on another channel during this time period and have been denied access. Both Saturday and Sunday are also completed booked. The system states it will open another channel when channel 16 is full.

Our feeling is that when a time request for part-time leased access cannot be accommodated within one hour of the time requested, that another channel be opened for access, so long as the part-time request is for at least a 13 week period (without limitation to the amount of time purchased down to one half-hour per week). Most cable systems currently carry channels which can be easily pre-empted without notice or penalty.

We feel that it is reasonable to require operators to remove current programming from set aside channels upon any request from a leased access programmer, whether full-time or part-time. We feel that the Commission as a regulatory agency is mandated by Section 612 to carry out Congress' intentions to provide access for unaffiliated programmers.

Selection of programmers

We feel that so long as an operator has set-aside capacity on the system that all leased access requests, full and part-time, must be reasonably accommodated, even if this means non-leased access programming must be bumped. If one channel is left under the set-aside, and a full-time leased access programmer and a part-time leased access programmer both desire the channel, the programmer with the greatest usage requirement should get the channel. We also believe, however, that each cable system should designate at least one of the channels under the set-aside for part-time access, (and possibly more depending on demand) and make any non-leased access programming which may be on this channel immediately pre-emptible for leased access programmers desiring to purchase time on the system.

Minority and educational programmers

We do not believe minority and educational programming which may be mandated as part of a system's franchise agreement should satisfy any part of the set-aside requirement for leased access.

Procedures for resolution of disputes

We believe the current dispute resolution process has been a dismal failure and can point to over 13 pending petitions for relief which we have filed, as evidence, stretching back over a period of 15 months. Not one of these petitions has been acted upon; our calls to Lloyd Young in the Cable Bureau have gone unanswered.

Restricting the ability of programmers to file petitions for rate disputes prior to review by an independent CPA makes absolutely no common sense. CPA's are not expert in FCC matters and we feel such a restriction is an example of a larger problem, which is that while the Commission is expert at rulemaking, when it comes to cable operators it has no enforcement procedures. All this proposal will do is further complicate the process, because under the proposed cost formula rules it's an even bet that most cable systems will mis-calculate the rates.

We suggest the operators be required to submit these rates annually to the Commission, along with supporting documentation. The Commission should review the rates and certify them as accurate. We strongly disagree with the concept that programmers should be the parties to detect rate errors; further, it is ludicrous to restrict programmers from bringing it to the Commission's attention when an error is discovered.

It should be amply clear to the Commission that most cable operators do not wish to comply with the leased access rules and will do almost anything to avoid compliance. This "CPA" proposal will do nothing but help operators not comply.

If the Commission decides to take this perilous road, we suggest that the cost of the CPA review be borne by the prevailing party. Also, we suggest that the Commission prepare guidelines for CPA's to review these charges and be certified in doing so. A list of certified CPA's could then be made available upon request from the Commission. We feel it would be a huge mistake to allow the operator to select the CPA due to the tremendous volume of dollars operators influence; how could a CPA firm be certain to be truly "unaffiliated".

The Commission recommends using ADR rather than itself for dispute resolution. We would like to make the point, once more, that it makes no sense for the Commission to enact these rules if it is not prepared to enforce them. There is quite a distinction between a "dispute" and breaking the law. The fact is cable operators are breaking the law regarding the existing leased access rules and we fear they will continue to do so under the new rules.

Resale of leased access time

We do not believe leased access time should be resold to parties other than either (a) the programming entity who produced the program, or (b) the principal party related to the production of the program. In other words, a person or company should not be allowed to purchase blocks of leased access time and resell them to other entities. Our reasoning behind this is that if this is allowed leased access capacity in a market could be controlled by a single or by few entities, thus blocking fair access from other programmers.

In Summary:

We believe the actual value of program time on cable systems is a fraction, perhaps ten percent, of current leased access rates. Operators are partially correct in assuming that lack of leased access activity is due to the cost of production, however this is rapidly changing due to desktop video and the falling price of computer RAM. Today, it is possible to assemble a broadcast quality edit suite for under $100,000, opening the door to a wider number of programmers as Congress foresaw.

We believe the chief problem with leased access is operator compliance. The Commission must strengthen its role as "policeman" and should address the issue of operator non-compliance with the leased access rules by imposing strict fines on those who would not comply. We disagree with tightening the "Petition for relief" process and, instead, believe if the Commission makes it clear to operators that non-compliance with the rules will not be tolerated and backs this with fines and forfeitures that compliance will thus increase and filing of Petitions for relief will decrease.

We believe the Commission must be extremely careful in allowing operators to assess additional fees on unaffiliated programmers. Outside of its watchful eye, we feel operators will attempt (and, as our exhibits demonstrate, are at present) gouging leased access programmers by requiring administrative, technical, and operator fees which cannot be substantiated by actual costs.

Part-time leased access will evolve into full-time channel leases for many unaffiliated programmers, thus the Commission must carefully nurture part-time access and provide protection for these programmers. It is our belief through our practical day-to-day experience, that operators fear part-time programmers as threats to advertising revenue, and this reason and not actual costs is the reason why operators seek to penalize part-time users of leased access. The Commission must consider this possibility and investigate it fully before making major rule changes.

We trust the wisdom of the Commission and leave our future as television programmers in your capable hands.

Respectfully submitted this 14th day of May, 1996

Gerry Cunningham, President
Lorilei Communications, Inc. dba THE FIRM
P.O. Box 309
18498 N.W. 24th Avenue
Citra, FL 32113
(352) 595-3000

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Exhibit A

applicable federal, state or local governmental rule, regulation or ordinance or the rights of any third party. The limits of coverage for any and all perils, hazards, negligent and willful conduct of Lessee, and risks mentioned above shall not be less than $1,000,000.00 single-limit liability. In addition to Lessee, such insurance policy or form of indemnity also shall name Lessor as an additional insured. Prior to or contemporaneously with the execution of this Agreement, Lessee shall deliver to Lessor a certificate or other evidence of the maintenance of such insurance coverage. The certificate shall indicate that such insurance shall not be canceled or modified except upon the delivery of 30 days' prior written notice to Lessor. The certificate shall indicate coverage for the entire term of this Agreement or Lessee shall provide (and shall continue to provide) subsequent certificates of insurance so as to provide to Lessor evidence of continuous insurance coverage that satisfies the above requirements throughout the term of this Agreement.

17. <u>Termination Upon Subscriber Request</u>. Lessor may terminate reception of Lessee's programming by any subscriber of the System who requests such termination. Lessee shall pay all costs associated with such termination.

18. <u>Termination</u>.

(a) This Agreement may be terminated immediately in the event of any of the following:

i) By either party in the event of any breach by the other of any provision of this Agreement (including without limitation any warranty or representation);

ii) By either party if termination is required by a final order of any Court or governmental body or agency of competent jurisdiction;

iii) By Lessor if the obligations of Lessor to lease channel space pursuant to Section 612 of the Communications Act of 1934 are repealed or are adjudged unconstitutional or otherwise invalid or unenforceable in a final, unstayed decision of any court of competent jurisdiction;

iv) By Lessor if Lessor ceases to provide cable television service to the System or becomes precluded from serving the subscribers of the System because of the termination, revocation or expiration of any franchise, this Agreement or the use of any of the channels by Lessee;

viii) the content of Lessee's programming and/or Lessor's use and delivery thereof;

ix) the violation of the rights of any third party, including without limitation any claims based on alleged or proven libel, slander, defamation, invasion of privacy, wrongful publicity, misrepresentation, obscenity, indecency or other forms of speech, whether protected or not by the Constitution of the United States or any state; infringement of common law or statutory copyright, literary right or music performance or synchronization right; unauthorized use of any trademark, trade name or service mark; breach of contractual or other obligations; and any other claim arising from the production, or insertion or transmission of Lessee's programming or any advertisements in connection therewith.

(b) Lessor shall give notice to Lessee within a reasonable time after receiving notice of any claim, event or condition giving rise to a claim of indemnification, but Lessee shall not be excused from any obligation to indemnify except to the extent that the failure to give notice prejudices the rights of Lessee. Lessor shall have the right to defend any claim by a third party with counsel of its own choosing (and to be indemnified for the reasonable fees and expenses of such counsel), but Lessee may participate in any such defense with its own counsel at its own expense. Lessor shall have the right to settle any such third party claim subject to the consent of Lessee, such consent not to be unreasonably withheld or delayed.

16. Insurance. Lessee, at Lessee's sole expense, shall obtain and keep in force, throughout the term hereof, with a reputable insurance company approved by Lessor and authorized to do business in the state in which the System is located, a policy of liability insurance insuring against all perils or hazards and any negligent, willful, intentional or other conduct of Lessee, and all other risks and liabilities reasonably associated with Lessee's obligations under this Agreement including, without limitation, full protection to Lessor from any consequences resulting from damage to Lessor's equipment caused by the attachment, utilization or malfunctioning of any equipment or devices supplied by Lessee or any violation by Lessee of any

We're taking television into tomorrow.

Exhibit B

TCI Cablevision of Alabama, Inc.

April 10, 1996

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Mr. Gerry Cunningham
President
Lorilei Communications, Inc. dba The Firm
P.O. Box 309
Citra, FL 32113

Dear Mr. Cunningham:

This is in regard to your letter of April 5, 1996 concerning leased access rates and other information to supplement the information provided to your company previously. This will correspond to the three additional numbered matters raised in your letter.

First, the rate for 30 minutes will be equal to one half of the hourly rate.

Second, the insurance to which you refer is an expectation we have for leased access users. The rules allow the cable operator to negotiate an agreement, and it is reasonable that we not incur costs or risk associated with the leased access use. A promise of indemnification is insufficient if not supported by adequate insurance. The provision in the contract is needed for our protection against liability.

Third, we do not allow the use of our trade name without our consent by any program provider. This does not prevent advertising which informs people that certain programming appears on their cable system. The approval period is what we reasonably need and allows you sufficient planning time between this date and the day your programming would begin

Other information was provided in the letter of April 1, 1996 to Lori Cato of your office.

Sincerely,

TCI Cablevision of Alabama, Inc.

Barry C. Kerr

Barry C. Kerr
Area Manager

3443 Lorna Lane
Post Office Box 360268 (Zip 35236-0268)
Birmingham, Alabama 35216-5293
(205) 822-8731
FAX (205) 823-0353

THE FIRM
A Lordel Communications Inc. Company

MEMO

4/25/96

Mr. Barry C. Kerr, Area Manager
TCI Cablevision of Alabama, Inc.
3443 Lorna Lane
P.O. Box 360268
Birmingham, AL 35216-5293
Via fax and U.S. Mail

Dear Mr. Kerr,

We are in receipt of your response to our questions regarding leased access on the Birmingham system.

The issues at hand are TCI's insurance requirement and use of the trade name "TCI Cable" in advertising.

While we appreciate the company's concern, we feel indemnification gives the operator protection against any litigation which might arise. To date, we have never had a problem with any of our programming. None of the systems on which our programming airs requires us to carry any form of insurance, including TCI in Daytona Beach, FL. We are puzzled as to why TCI would have greater exposure to litigation in the Birmingham market than in the Daytona Beach market?

There is no basis in the Commission's rules for blocking access to your system from an unaffiliated programmer by requiring insurance. We have two Petition's for Relief currently pending at the Commission on this matter, and will file again on this matter if forced to do so.

P.O. Box 309 Citra, FL 32113 (352) 595-3000 Fax (352) 595-3008

Withholding the name of your cable system is the same as renting retail space with a clause in the contract that prohibits using the address of the space in advertising. We cannot agree to a contract with this type of clause for obvious reasons, and feel that it is superfluous and anti-competitive.

We would prefer to work these issues out with you, however after consulting our counsel in D.C. we feel that our position is strong given the current rules, and that we would easily prevail if these issues were to be tested at the Commission or in Federal District Court.

Please get back to us with your comments.

Sincerely,

Gerry Cunningham, President
Lorilei Communications, Inc. dba THE FIRM

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TCI Cablevision of Alabama, Inc.

May 1, 1996

Mr. Gerry Cunningham, President
Lorilei Communications, Inc. dba The Firm
P.O. Box 309
Citra, FL 32113

Dear Mr. Cunningham:

This is in regard to your further correspondence of April 25, 1996 concerning leased access. You again inquire about the provisions in our contract regarding insurance and the use of our trade name.

The insurance provisions in the form Channel Lease Agreement that I sent to you are of fundamental importance to us. Section 612 of the Telecommunications Act of 1996 allows cable operators to establish the price, terms and conditions of leased access use "which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." The insurance required by our form contract protects our company from financial risks associated with the use of our cable television system by leased access providers. Such risks include damage to our plant or headend and liability associated with the content of programming. Without insurance, we would not have adequate assurance of your ability to provide indemnification at the time a claim might arise. Many leased access providers have obtained the required insurance and have leased time on cable television systems managed by or affiliated with TCI. Even if the office at Daytona Beach leased you time without evidence of your insurance, I am informed that it remains our company's policy that a signed contract and proof of adequate insurance must be obtained from all leased access providers.

The provision in the contract regarding our trade name is not a prohibition on the use of our trade name. It simply requires prior approval for the use of the name. Any company should have a concern about the use of its trade name. We cannot grant the use of our trade name to any program provider without our prior approval. This is a reasonable expectation for any company.

3443 Lorna Lane
Post Office Box 360268 (Zip 35236-0268)
Birmingham, Alabama 35216-5293
(205) 822-8731
FAX (205) 823-0353

The provisions in the contract which we forwarded are reasonable to assure that the leased access use will not adversely affect the cable system. We are certainly not blocking access to the system. Upon entering into the agreement, you will be provided with access on the cable system.

I hope that this letter answers all of your questions.

Sincerely,

TCI Cablevision of Alabama, Inc.

Barry C. Kerr

Barry C. Kerr
Area Manager

THE FIRM

A Lorilei Communications, Inc. Company

3/27/96

Exhibit C

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MAY 15 1996

FCC MAIL ROOM

Mr. Harvey T. Boyd, V.P.
Post-Newsweek Cable/Idabel, OK
4742 N. 24th St. Suite 270
Phoenix, AZ 85016
Via fax and U.S. Mail

Dear Mr. Boyd,

We are in receipt of your response dated 3/15/96 to our inquiry regarding leased access rates and information on the Idabel, OK system. In reviewing the materials, we have several questions which require answers prior to executing a lease with your company.

1. Why does your system require tapes to be in house 14 days prior to air?
2. How does the system justify the stipulation in the contract of a $5,000,000 broadcaster's liability policy with the system named as co-insured? Under what section of communications law does the system feel it is allowed to require this as a condition of carriage? How was this amount arrived at?
3. The four-hour minimum seems to contradict recent FCC ruling 96-122 which stipulates a minimum of one-half hour. Please explain how this is justified.
4. How is the programming review amount of $17.87 calculated and how is this fee justified under the rules?
5. Your letter also stipulates a $21.24 technical fee for playback per hour. How is this fee calculated and what evidence can you bring forth to support that this is an actual charge?
6. A $20 per month billing and collection fee is stipulated. How is this fee calculated and how is it justified inasmuch as the contract calls for pre-payment.
7. We had also requested the channel position where leased access programming appears on the system. Your letter did not address this and we again request it.

Time is of the essence. Please get back to us with answers to this inquiry within 7 business days.

Sincerely,

Gerry Cunningham, President
Lorilei Communications, Inc. dba THE FIRM

P.O. Box 309 Citra, FL 32113 (352) 595-3000 (800) 479-FIRM Fax (352) 595-3008